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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re NOAH A., A Person Coming Under
the Juvenile Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

R. L.,

Defendant and Appellant.

B261729

(Los Angeles County
Super. Ct. No. DK04923)

APPEAL from an order of the Superior Court of Los Angeles County,
Stephen C. Marpet, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.)
Affirmed.

Julie E. Braden, under appointment by the Court of Appeal, for Defendant and
Appellant.

Office of the County Counsel, Mark J. Saladino, County Counsel,
Dawyn R. Harrison, Assistant County Counsel, and Peter Ferrera, Deputy County
Counsel, for Plaintiff and Respondent.

INTRODUCTION

Mother R.L. appeals from the juvenile court's order detaining her son, Noah A., and removing him from her custody in response to a supplemental petition brought by the Department of Children and Family Services pursuant to Welfare and Institutions Code, section 387. We affirm the order because substantial evidence supports the court's finding that mother's ongoing drug abuse creates a substantial risk that Noah would suffer serious physical harm if left in mother's custody. Short of removal from mother's custody, no reasonable means of averting harm to Noah exists.

FACTS AND PROCEDURAL BACKGROUND

Noah A., currently age 2, is the child of R.L. and David A. Mother and father were never married. Prior to the involvement of Department of Children and Family Services (DCFS) in this case, Noah and mother resided with Noah's maternal great-grandparents. Noah's maternal grandmother, uncle, and minor aunt lived on the same property in a converted garage.

Beginning in 2013, mother did not allow father to have contact with Noah because, according to mother, father was using methamphetamines and had been verbally and physically abusive to her in the past. Father initiated an action in family court in order to establish parental rights. The family court issued a temporary order giving mother and father joint legal custody and giving mother physical custody of Noah. The court ordered father's visitation with Noah to be professionally supervised.

On April 2, 2014, DCFS received a referral concerning Noah with allegations of general child neglect by mother. DCFS immediately initiated an investigation.

DCFS learned mother was arrested in 2011 for being under the influence of methamphetamines and was arrested several times in 2012 for possession of methamphetamines. Although mother denied using methamphetamines during her pregnancy with Noah, DCFS noted mother's arrest and conviction for possession of a controlled substance on October 18, 2012 occurred only five weeks before Noah's birth. According to DCFS, mother "adamantly expressed" that she no longer used methamphetamines, but refused to submit to voluntary drug testing during the course of

the initial investigation. During interviews with the DCFS social worker, mother appeared coherent and alert, and did not show any signs that she was under the influence of drugs or alcohol. The social worker observed no signs of drugs or drug paraphernalia in the home. She also interviewed the maternal grandmother and the maternal great-grandparents, each of whom denied mother showed any signs of using drugs.

With respect to father, DCFS learned he had an extensive history of illicit drug use, including drug related arrests and convictions dating back to 1987. However, father enrolled in an inpatient residential substance abuse rehabilitation program in October 2013. As of April 1, 2014, father was compliant with the program and had been drug testing for DCFS and the rehabilitation program with negative results since his enrollment.

On May 8, 2014, DCFS filed a juvenile dependency petition concerning Noah A., alleging general neglect due to both parents' substance abuse. As to father, DCFS alleged that he had a history of substance abuse and was a current abuser of alcohol and methamphetamine. In addition, the petition alleged father's other child, the product of a relationship with a different woman, was then a dependent of the juvenile court due to father's substance abuse. Father consented to Noah's detention from him.

With respect to mother, the petition alleged she had an unresolved history of substance abuse including methamphetamine which rendered her incapable of providing regular care to and supervision of two-year-old Noah. Mother denied the allegations.

At the initial detention hearing on May 8, the court released Noah to mother. The court ordered mother to submit to a drug test that day and authorized DCFS to detain Noah from her if she tested positive for drugs. The court made emergency detention findings against father but continued the matter to May 12, so that DCFS could make a more thorough assessment of father's progress in the rehabilitation program. DCFS subsequently verified father was still participating in the residential substance abuse program and had negative test results on all 68 random drug tests between October 29, 2013 and May 8, 2014.

At the continued detention hearing on May 12, 2014, the court released Noah to the parents over the objection of DCFS. The court gave mother primary custody of Noah while father participated in a residential drug treatment program and ordered the parents to work out a custody sharing arrangement after father graduated from the program and moved to sober living. The court ordered mother to submit to weekly random drug tests and authorized DCFS to detain Noah from mother if she tested positive or had an unexcused missed test.

DCFS continued to investigate the family's situation. The assigned social worker noted father had been successfully participating in his rehabilitation program and appeared motivated to maintain his sobriety. With respect to mother, the social worker noted mother had never completed a drug rehabilitation program, even though mother admitted to using methamphetamines in the past. Further, mother stated she would not enroll in a rehabilitation program unless and until she was required to do so by the court or by DCFS. In addition, mother failed to test as requested on June 20 and July 15, 2014. On the basis of these facts, the social worker concluded mother has a poor perception of the need to address her substance abuse. The social worker also reviewed mother's criminal record, observed she engaged in drug-related criminal activity while pregnant with Noah, and concluded "[s]uch acts while pregnant with Noah suggest mother's concern for her yet unborn child's health and safety is minimal."

At the jurisdiction and disposition hearing on July 21, 2014, the juvenile court found jurisdiction under Welfare and Institutions Code, section 300, subdivisions (b) and (j).¹ With respect to mother, the court sustained allegations that she "has an unresolved history of substance abuse including methamphetamine, which renders the mother incapable of providing the child with regular care and supervision," and that her "history of illicit drug use endangers the child's physical health and safety and places the child at risk of physical harm and damage." The court again placed Noah in the home of the parents and gave primary physical custody to mother until father obtained

¹ All further statutory references are to Welfare and Institutions Code.

suitable housing. The court also ordered mother to complete ten consecutive weekly random drug tests and participate in individual counseling. The court authorized DCFS to detain Noah from mother if she missed a test or tested positive for drugs and set the case for a judicial review hearing on January 16, 2015.

Over the next five months, mother established a pattern of avoiding the random drug tests. For example, mother failed to test on July 28 and August 1, then tested negative on August 14. Mother again failed to test on August 29 and September 4, then tested negative on September 30. This pattern continued throughout October, November and into December. During this five month period, mother was requested to test 22 times but failed to test on 13 of those days. With respect to each of the missed tests, mother provided DCFS with a reason for her failure to test as required. Representative examples include: mother lost her identification card; mother appeared at the testing site but provided an insufficient urine sample; mother arrived at test site after it closed for the day; mother had a family emergency; mother had no transportation to the testing site; and mother did not want to take Noah out in inclement weather.

Mother tested positive for methamphetamine on December 18 and then failed to test on December 23, December 26 and December 30. Mother denied using methamphetamine and claimed the positive test result of December 18 must have registered prescription strength ibuprofen, which she stated she took on one occasion in order to relieve back pain. DCFS found this explanation implausible, particularly in light of mother's history of drug abuse and pattern of failing to report for random drug testing. Further, DCFS concluded "it is highly plausible that [mother] either continued to use or relapsed and attempted to avoid a positive drug test result by not randomly testing and then requesting a make up on demand."

During this same five month period, father was discharged from his inpatient drug rehabilitation program², moved to a sober living home, enrolled in an outpatient

² Father was prematurely discharged from the inpatient substance abuse treatment program in August 2014, "due to boundary related issues with at least one female resident."

program, resumed individual counseling, created a social support network, obtained employment, and continued to test negative for drugs and alcohol on a regular basis.

On January 16, 2015, the parties appeared for the scheduled judicial review hearing. After learning of mother's positive test for methamphetamine and her repeated failure to adhere to the court's random drug test order, the juvenile court detained Noah from mother. The court released Noah to father, pending DCFS's confirmation that father had obtained appropriate housing. In the meantime, the court ordered father to make an emergency plan that would allow Noah to reside with his great-grandparents, so long as mother was not also residing there.

DCFS subsequently filed a supplemental petition pursuant to section 387, seeking to remove Noah from mother's custody. The DCFS's supplemental petition alleged mother "has a history of illicit drug abuse and is a current user of amphetamine and methamphetamine which renders the child's mother incapable of providing regular care for the child. On December 18, 2014, the mother had a positive toxicology screen for amphetamine and methamphetamine. On December 18, 2014, the mother was under the influence of illicit drugs while the child was in the mother's care and supervision. The child is of such a young age requiring constant care and supervision and the mother's illicit drug use interferes with providing regular care and supervision of the child. The mother's use of illicit drugs endanger[s] the child's physical health and safety and create[s] a detrimental home environment, placing the child at risk of physical, harm and damage."

In its detention report, DCFS noted mother tested positive for methamphetamine on December 18, while Noah was in her care and custody. In addition, with respect to mother's pattern of delaying her drug tests, DCFS stated "it is highly plausible that [mother] either continued to use or relapsed and attempted to avoid a positive drug test result by not randomly testing and then requesting a make up on demand." "DCFS conducted an assessment and determined that the risk level remains high if the Court were to return [minor] Noah [A.] to the care of [mother] [R.L.]."

On January 22, 2015, the juvenile court conducted an initial hearing on the section 387 petition. In addition to expressing concern over mother's positive drug test, the court noted mother violated the court's prior order by failing to appear for random drug testing on more than ten occasions. Further, the court emphasized that Noah was very young—only two years old--and expressed its concern for Noah's physical safety while in mother's care. The court adopted its prior detention findings and ordered Noah released to father. Because father had not yet found appropriate housing, the court ordered DCFS to provide father housing assistance. The court set the matter for further hearing on January 26, 2015.

On January 26, 2015, the court held an adjudication hearing on the section 387 petition. The court sustained the supplemental allegations in the petition and modified the dispositional order of July 21, 2014, removing Noah from mother's custody and placing Noah with father, pending DCFS approval of his housing situation. The court emphasized mother's unresolved history of substance abuse and noted her failure to comply with the case plan by missing more than 10 random drug tests and testing positive for methamphetamine on December 18, 2014. The court ordered mother to complete a six month drug and alcohol rehabilitation program, submit to weekly random drug and alcohol testing, participate in a 12 step program with a sponsor, and begin individual counseling. In addition, the court authorized supervised visitation for mother at least twice a week for two hours, and gave DCFS authority to liberalize visitation at its discretion.

Mother timely appealed.

CONTENTIONS

Mother argues the juvenile court erred in finding the court's initial disposition was not effective to protect Noah, and in removing Noah from her custody. In support of both arguments, mother contends no substantial evidence supports the juvenile court's conclusion that her drug abuse interfered with Noah's care.

DISCUSSION

1. Applicable Law

A section 387 supplemental petition is used to change the placement of a dependent child from the physical custody of a parent to a more restrictive level of court-ordered care. (Welf. & Inst. Code, § 387, subd. (a); Cal. Rules of Court, rule 5.560, subd. (c).) The petition must establish “that the previous disposition has not been effective in the rehabilitation or protection of the child.” (Welf. & Inst. Code, § 387, subd. (b).) A section 387 hearing is bifurcated into “(1) an adjudicatory hearing on the merits of the allegations in the petition and (2) a disposition hearing on the need for the removal of the child from his or her current level of placement.” (*In re Javier G.* (2006) 137 Cal.App.4th 453, 460; Cal. Rules of Court, rule 5.565, subd. (e)(1).) If the court finds the allegations of the supplemental petition are true, it conducts a dispositional hearing to determine whether removing custody is appropriate. (Cal. Rules of Court, rule 5.565, subd. (e)(2); *In re T.W.* (2013) 214 Cal.App.4th 1154, 1161.)

Although the trial court applies different standards of proof in the jurisdiction and disposition phases, we review all the juvenile court’s findings for substantial evidence. (*In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1216.) Under this standard, “we resolve all conflicts and make all reasonable inferences from the evidence to uphold the court’s orders, if possible.” (*Ibid.*) “We do not pass on the credibility of witnesses, attempt to resolve conflicts in the evidence or weigh the evidence. Instead, we draw all reasonable inferences in support of the findings, view the record in favor of the juvenile court’s order and affirm the order even if other evidence supports a contrary finding.” (*In re T.W.*, *supra*, 214 Cal.App.4th at pp. 1161-1162.) “[O]n appeal from a judgment required to be based upon clear and convincing evidence, “the clear and convincing test disappears . . . [and] the usual rule of conflicting evidence is applied, giving full effect to the respondent’s evidence, however slight, and disregarding the appellant’s evidence, however strong.” [Citation.]’ [Citation.]” (*In re E.B.* (2010) 184 Cal.App.4th 568, 578.)

“ ‘The juvenile court has broad discretion to decide what means will best serve the child’s interest.’ [Citation.] ‘Its determination will not be reversed absent a clear abuse of that discretion.’ [Citation.]” (*In re Cole Y.* (2015) 233 Cal.App.4th 1444, 1456.)

2. *Substantial Evidence Supports The Juvenile Court’s Determination That The Prior Disposition Was Not Effective*

The first phase of a section 387 hearing “is a factfinding proceeding to determine whether the allegations of the supplemental petition are true. [Citations.]” (*In re Jonique W.* (1994) 26 Cal.App.4th 685, 691.) Because the juvenile court has already found jurisdiction by this stage in the proceedings, “[t]he only fact necessary to modify a previous placement is that the previous disposition has not been effective in protecting the child. [Citations.]” (*In re T.W., supra*, 214 Cal.App.4th at p. 1161; Welf. & Inst. Code, § 387.)

Mother argues the allegations of the supplemental petition are not true, and that no substantial evidence supports the juvenile court’s finding that the prior disposition was ineffective to protect Noah. More particularly, she asserts that although she tested positive for methamphetamine in December 2014, there is no evidence her drug use interfered with Noah’s care.

In the initial disposition of July 21, 2014, the juvenile court recognized mother’s history of drug abuse and expressly conditioned Noah’s placement with mother on mother’s compliance with random drug testing and on negative drug test results. Further, the court authorized DCFS to remove Noah immediately if mother tested positive for drugs. These conditions on Noah’s placement with mother were undoubtedly designed to ensure Noah would receive the supervision and care necessary to protect a very young child such as Noah from the inherent dangers of infancy and toddlerhood.

In the context of a dependency proceeding involving a very young child such as Noah, “the finding of substance abuse is prima facie evidence of the inability of a parent or guardian to provide regular care resulting in a substantial risk of physical harm.”

(*In re Drake M.* (2012) 211 Cal.App.4th 754, 767; *In re Rocco M.* (1991) 1 Cal.App.4th 814, 824.) Here, the evidence demonstrates mother has an ongoing substance abuse issue. As the juvenile court emphasized at the initial hearing on the section 387 petition, mother tested positive for methamphetamines on December 18, 2014, while Noah was in her care and custody. Further, during the five months following Noah's placement with her, mother failed to complete random drug tests on June 20, July 15, July 28, August 1, August 29, September 4, October 22, October 24, November 3, December 2, December 16, December 23, December 26 and December 30, 2014. Although mother offered a variety of excuses for her failure to test as required, the juvenile court could discount mother's excuses and reasonably infer Mother would have tested positive if she had tested on those dates. (Accord, *In re Christopher R.*, *supra*, 225 Cal.App.4th at pp. 1218-1219 [failure to drug test consistently, combined with other factors, justified juvenile court's exercise of dependency jurisdiction].) We defer to the juvenile court's credibility assessment as well as its appraisal of the relative weight of the evidence, see *In re T.W.*, *supra*, 214 Cal.App.4th at pp. 1161-1162, and conclude substantial evidence supports the court's determination that the prior disposition was not effective in protecting Noah.

3. *Substantial Evidence Supports The Juvenile Court's Removal Order*

With respect to the disposition phase of a section 387 petition, the court applies the same procedures that govern disposition hearings on a section 300 petition. (Cal. Rules of Court, rule 5.565, subd. (e)(2).) The standard for removal on a supplemental petition is clear and convincing evidence: the Department must show "[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor" if left in parental custody "and there are no reasonable means by which the minor's physical health can be protected without removing the minor from [parental] physical custody." (Welf. & Inst. Code, § 361, subd. (c)(1); *In re Paul E.* (1995) 39 Cal.App.4th 996, 1000-1003.) A removal order is proper if it is based on proof of parental inability to provide proper care for the minor and proof of a potential detriment to the minor if he or she remains with the parent.

(*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1136, overruled on another point by *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 749; *In re Noe F.* (2013) 213 Cal.App.4th 358, 367.)

As an initial matter, we reject mother's argument that the court's order should be reversed because the juvenile court failed to state expressly that it applied the clear and convincing standard of proof required by section 361, subdivision (c). Mother's reliance on *In re Henry V.* (2004) 119 Cal.App.4th 522, is misplaced. There, the appellate court concluded the juvenile court's findings were not supported by substantial evidence in the first instance. As we explain, we reach the opposite conclusion here. Further, in *In re Henry V.* the court of appeal simply "bolstered" its conclusion regarding the lack of substantial evidence by noting that neither DCFS nor the court stated the proper standard of proof. (*Id.* at p. 530.) The court did not hold, or even imply, that it would be reversible error for a court not to state on the record that it applied the proper standard of proof.

As to the removal order itself, the juvenile court concluded removal was necessary and appropriate in part because it found mother was currently using drugs on a regular basis and was unable to provide Noah with proper care and supervision as a result. As already discussed, substantial evidence supports the juvenile court's finding in that regard.

In addition, the juvenile court had good reason to think mother's drug abuse would continue. Significantly, mother failed to take steps to address her drug abuse, even after the juvenile court found jurisdiction due to her history of drug abuse. According to DCFS, mother minimized her significant history of illicit drug use and drug related criminal activity. Further, mother denied using methamphetamine in December, instead claiming her positive test result must have been triggered by prescription strength ibuprofen. Mother offered numerous implausible excuses for her failure to submit to random drug testing and attempted to delay nearly every random test requested of her, which DCFS concluded was likely a symptom of either continued drug use or a relapse. In addition, mother flatly refused to participate voluntarily in any sort

of substance abuse rehabilitation program in the absence of a court order that she do so. Taken together, these facts provide additional and substantial evidence to support the juvenile court's removal order.

Mother argues the removal order is improper because the DCFS reports contain some evidence Noah received proper care while in her custody and there is no direct evidence Noah was actually harmed as a result of her drug abuse. We reject this argument for several reasons.

First, mother cites selected statements in the DCFS reports indicating Noah was receiving appropriate medical care and stating social workers observed no obvious signs of drugs or mother's drug use during home visits. She ignores less favorable evidence, such as her consistent avoidance of random drug testing. By presenting only the evidence most favorable to her, mother violates the substantial evidence rule. (See *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881 [appellants challenging a decision for lack of substantial evidence "are required to set forth in their brief *all* the material evidence on the point and *not merely their own evidence*"].) The question before us is not, as mother argues, whether some evidence contradicts the juvenile court's removal order. "[O]ur power begins and ends with a determination as to whether substantial evidence exists, contradicted or uncontradicted, supporting the dependency court's determinations. We review the evidence in the light most favorable to the dependency court's findings and draw all reasonable inferences in support of those findings. [Citations.] Thus, we do not consider whether there is evidence from which the dependency court could have drawn a different conclusion but whether there is substantial evidence to support the conclusion that the court did draw. [Citations.]" (*In re Noe F.*, *supra*, 213 Cal.App.4th at p. 366.)

Further, and as to Mother's assertion that Noah was not harmed as a result of her drug use, we reiterate that actual harm is not a prerequisite to jurisdiction in dependency proceedings. (See *In re Giovanni F.* (2010) 184 Cal.App.4th 594, 598 ["[t]he child need not have been actually harmed in order for the court to assume jurisdiction"]; *In re James R.* (2009) 176 Cal.App.4th 129, 135; *In re Diamond H.*, *supra*, 82 Cal.App.4th at

p. 1136.) Section 300, subdivision (b), requires proof of either serious physical harm or illness to the child *or* a “substantial risk” of such harm or illness. (See *In re Rocco M.*, *supra*, 1 Cal.App.4th at p. 820; *In re David M.* (2005) 134 Cal.App.4th 822, 829.) We are well aware that a parent’s use of illicit drugs does not always result in a disability that requires removal. (See, e.g., *In re Destiny S.* (2012) 210 Cal.App.4th 999, 1003, and cases cited therein.) However, under the circumstances present in this case, we cannot say the juvenile court abused its discretion in removing Noah from mother’s care and custody.

DISPOSITION

The order of the juvenile court sustaining the supplemental petition and removing Noah from mother’s custody is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JONES, J.*

WE CONCUR:

EDMON, P. J.

KITCHING, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.